

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES J. BOWN)	
Claimant)	
VS.)	
)	Docket No. 1,022,202
FLUID TECH, LLC)	
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appealed the March 28, 2006, Award entered by Administrative Law Judge Robert H. Foerschler. The Workers Compensation Board heard oral argument on July 6, 2006.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Katharine M. Collins of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges he injured his back while working for respondent from July 16, 2004, through the end of his employment on November 2, 2004. In the March 28, 2006, Award, Judge Foerschler denied claimant's request for workers compensation benefits after finding claimant failed to provide respondent with timely notice of his alleged back injury.

Claimant appealed the Award, contending he did not know he had sustained a work-related injury until February 2005, when he was informed of that fact by a physician. Claimant argues the notice he provided respondent within 10 days of learning his injury was

work-related should be considered timely notice under the Workers Compensation Act. Moreover, claimant argues that he told his supervisor on several occasions that his work was hurting his back and, therefore, respondent had timely notice of his back injury. Consequently, claimant requests the Board to reverse the Award and grant him (1) temporary total disability compensation from November 2, 2004, to May 6, 2005; (2) permanent disability compensation for a 15 percent whole person functional impairment; (3) payment of medical bills; and (4) future medical benefits.

Conversely, respondent and its insurance carrier contend (1) claimant did not sustain accidental injury arising out of and in the course of his employment; (2) claimant failed to provide respondent with timely notice of his accident; (3) claimant failed to prove he was temporarily and totally disabled during the period for which he is requesting temporary total disability benefits; and (4) claimant should not be granted payment of any medical bills or future medical benefits. Accordingly, respondent and its insurance carrier ask the Board to affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant injure his back working for respondent from July 16 through November 2, 2004? If so, what is the date of the accident for purposes of notice and disability compensation?
2. Did claimant provide respondent with timely notice of his alleged accidental injury?
3. Is claimant entitled to receive temporary total disability benefits from November 2, 2004, to May 6, 2005?
4. What is the nature and extent of claimant's disability, if any?
5. Should payment of medical bills be granted?
6. Is claimant entitled to receive future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the March 28, 2006, Award should be affirmed. The evidence fails to establish that claimant provided respondent with timely notice of his alleged back injury as required by K.S.A. 44-520, which provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and

address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Accordingly, any notice provided an employer more than 75 days following the accident is untimely unless the employer, or its agent, had actual knowledge of the accident, the employer was unavailable to receive such notice, or the injured worker was *physically* unable to give notice.

Claimant argues he was not aware the back complaints he developed after July 16, 2004, were from his work activities. Rather, claimant argues he believed his symptoms were from a congenital condition as he had been advised by his personal physician. Accordingly, claimant did not notify respondent that he had injured his back at work or that his work was aggravating his back before his employment was terminated on November 2, 2004. Consequently, respondent did not receive notice that claimant was alleging he had injured or aggravated his back at work until February 24, 2005, when the company received claimant's written claim for workers compensation benefits.

Whether claimant's back injury occurred on July 16, 2004, when he believes he slipped from a steel beam and felt a pinch or pop in his back, or whether claimant sustained a repetitive series of mini-traumas to his back through his last day of working for respondent on November 2, 2004, the notice to respondent on February 24, 2005, is well beyond the 75-day period provided by K.S.A. 44-520.

Considering both claimant's testimony and the testimony of respondent's Carole Havlin, the Board finds that claimant did not relate his ongoing back complaints to the work he was performing for respondent. More specifically, the Board finds Ms. Havlin's testimony persuasive that she probably had a dozen conversations with claimant after July 2004 and he never said he had been injured at work and he never said his job duties affected his back. Moreover, she asked claimant if he had hurt his back at work and he denied his back problems were work-related.

As the evidence fails to establish that respondent had actual knowledge that claimant injured or aggravated his back at work, or that respondent was not available to receive

notice of the accidental injury, or that claimant was not physically able to provide respondent with notice, the Board must find that claimant had a maximum of 75 days from November 2, 2004, to provide respondent with notice of his back injury. Consequently, claimant's request for workers compensation benefits must be denied.

Unfortunately, these facts produce a harsh result. But any relief must come from the legislature. The Workers Compensation Act was intended to shift the responsibility of occupational injuries to industry. That purpose is stymied, however, by the three separate statutes of limitation contained in the Act – notice, written claim and application for hearing. And in this instance, claimant's efforts to obtain benefits for his injuries are defeated by his somewhat belated notice.

Based upon the above finding and conclusion, the remaining issues are rendered moot.

AWARD

WHEREFORE, the Board affirms the March 28, 2006, Award entered by Judge Foerschler.

IT IS SO ORDERED.

Dated this ____ day of July, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Katharine M. Collins, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director